

**Children and Family Law Program
Committee for Public Counsel Services**

**Recent Developments
(December 2002 – June 2003)**

Remember, always Shepardize! Applications for further appellate review may have been granted after the publication date of these case summaries. Furthermore, opinions may be "amended," sua sponte, or upon motion of a party.

ABUSE – DEFINITION OF ABUSE	1
ADOPTION- DISPENSING WITH PARENTAL CONSENT, AMERICANS WITH DISABILITY ACT	1
ADOPTION – DISPENSING WITH PARENTAL CONSENT, BEST INTERESTS OF CHILD (BOND WITH FOSTER PARENTS)	1
ADOPTION - DISPENSING WITH PARENTAL CONSENT, STANDING OF SIBLING	1
APPELLATE PRACTICE - MOOTNESS	2
APPELLATE PRACTICE - PRESERVATION OF APPELLATE ISSUE, BEST INTERESTS OF CHILD	2
APPELLATE PRACTICE - PRESERVATION OF APPELLATE ISSUE, INDIGENT COURT COSTS ACT	2
APPELLATE PRACTICE – RECONSTRUCTING THE RECORD	2
APPELLATE PRACTICE – SEVERANCE OF DECREES	2
APPELLATE PRACTICE – STANDING	3
CHILD SUPPORT	3
CHILD’S PREFERENCE – WEIGHT GIVEN IN DETERMINING CUSTODY	3
CONFLICT OF INTEREST - DEPARTMENT OF SOCIAL SERVICES	3
COUNSEL - CONFLICT OF INTEREST	4
COUNSEL - INEFFECTIVE ASSISTANCE	5
COUNSEL – RIGHT TO COUNSEL	5
COUNSEL – ROLE OF CHILD’S COUNSEL	6
COUNSEL – RULES OF PROFESSIONAL CONDUCT, PERJURIOUS TESTIMONY BY CLIENT	7
COUNSEL – WAIVER OF COUNSEL	8
CROSS EXAMINATION - IMPROPER QUESTIONING	8
CROSS EXAMINATION - LIMITATION	8
DEPARTMENT OF SOCIAL SERVICES – CLAIMS AGAINST	8
DEPARTMENT OF SOCIAL SERVICES – FAILURE TO DISCLOSE CHILD’S CHANGE OF PLACEMENT	8
DISCOVERY - FAILURE TO COMPLY, EXPERT WITNESS	9
DOMESTIC VIOLENCE – ABUSE PREVENTION ORDER	9
DUE PROCESS – BURDEN OF PROOF	9
EMANCIPATION OF CHILDREN	10
EVIDENCE – EXPERT TESTIMONY, NEED FOR EXPERT WITNESS	10
EVIDENCE – FINDINGS FROM PRIOR TERMINATION PROCEEDING	10
EVIDENCE – HEARSAY, ADMISSIONS OF A PARTY OPPONENT.	11
EVIDENCE – HEARSAY, DOCTRINE OF VERBAL COMPLETENESS	11
EVIDENCE – HEARSAY, FRESH COMPLAINT	11
EVIDENCE – HEARSAY, LEARNED TREATISE	12
EVIDENCE – HEARSAY, OFFICIAL/PUBLIC RECORDS	12
EVIDENCE – HEARSAY, PAST RECOLLECTION RECORDED	13
EVIDENCE – HEARSAY, STATE OF MIND	13
EVIDENCE – UNSUPPORTED 51A	13
FINDINGS OF FACT – DEFERENCE TO TRIAL JUDGE, DELAY IN PROCEEDINGS	14
FINDINGS OF FACT - USE OF PROPOSED FINDINGS OF FACT	14
JUDICIAL DISCRETION	14
INDIGENT COURT COSTS ACT	15

JURISDICTION - PROBATE COURT EQUITY POWERS	15
MOTION FOR NEW TRIAL	15
PARENTAL UNFITNESS – EDUCATIONAL NEGLECT	15
PARENTAL UNFITNESS – FITNESS TO PARENT ONE CHILD BUT NOT ANOTHER	16
PARENTAL UNFITNESS – SUFFICIENCY OF EVIDENCE	16
PARENTAL UNFITNESS - SUFFICIENCY OF EVIDENCE, NEXUS BETWEEN PARENT’S CONDUCT OR CONDITION AND HARM TO CHILD	19
PRIVILEGED COMMUNICATION - ACCESS TO PRIVILEGED RECORDS	19
PRIVILEGED COMMUNICATION – PSYCHOTHERAPIST-PATIENT	19
PRIVILEGED COMMUNICATION – SOCIAL WORKER-CLIENT	20
REASONABLE EFFORTS	20
REASONABLE EFFORTS, DISABLED PARENTS	20
SIBLING RELATIONSHIP	20
TEENS AGING OUT OF FOSTER CARE	20
TRIAL – ERRORS IN JUDGE VERSUS JURY TRIAL	20
TRIAL – REOPENING OF EVIDENCE	21
TRIAL PRACTICE - LATE DISCLOSURE OF WITNESS	21
TRIAL PRACTICE – OATH	21
VISITATION – CONDITIONAL ORDERS	21
VISITATION - POSTTERMINATION VISITATION/ POSTADOPTION VISITATION	21
VISITATION- SIBLING VISITATION	22
VISITATION – TERMINATION OF PARENT VISITS	23
WITNESSES – COMPETENCE OF CHILD WITNESS	23
WITNESSES - PARENTS	24
72 HOUR HEARING – DENIAL OF CONTINUANCE	24

Cases

<u>Adoption of Daniel</u> , 58 Mass. App. Ct. 195 (2003).....	1, 10, 16, 20, 21
<u>Adoption of Eduardo</u> , 57 Mass. App. Ct. 278 (2003).....	1, 3, 8, 19, 20
<u>Adoption of Pierce</u> , 58 Mass. App. Ct. 342 (2003)	1, 3, 4, 20, 22
<u>Adoption of Rhona</u> , 57 Mass. App. Ct. 479 (2003).....	1, 10, 13, 14, 16, 18, 19, 21, 23
<u>Adoption of Salvatore</u> , 57 Mass. App. Ct. 929 (2003) (rescript).....	9, 16, 17, 24
<u>Adoption of Terrence</u> , 57 Mass. App. Ct. 832 (2003)	1, 2, 9, 10, 17, 21
<u>Care and Protection of Emily</u> , 58 Mass. App. Ct. 190 (2003).....	16
<u>Care and Protection of Georgette</u> , 439 Mass. 28 (2003).....	2, 3, 4, 5, 6, 15
<u>Care and Protection of Olga</u> , 57 Mass. App. Ct. 821 (2003).....	14, 17
<u>Care and Protection of Perry</u> , 438 Mass. 1014 (2003) (rescript).....	2, 24
<u>Commonwealth v. Boateng</u> , 438 Mass. 498 (2003).....	4
<u>Commonwealth v. Eugene</u> , 438 Mass. 343 (2003).....	11
<u>Commonwealth v. Evans</u> , 439 Mass. 184 (2003)	13
<u>Commonwealth v. Howell</u> , 57 Mass. App. Ct. 716 (2003)	12
<u>Commonwealth v. Jordan</u> , 439 Mass. 47 (2003)	8
<u>Commonwealth v. Kelly</u> , 57 Mass. App. Ct. 201 (2003)	2
<u>Commonwealth v. Mitchell</u> , 438 Mass. 535 (2003)	7
<u>Commonwealth v. Montanez</u> , 439 Mass. 441 (2003).....	5, 11, 13, 20
<u>Commonwealth v. Murphy</u> , 57 Mass. App. Ct. 586 (2003)	8, 21, 23
<u>Commonwealth v. Oliveira</u> , 438 Mass. 325 (2002).....	19, 20
<u>Commonwealth v. Pamplona</u> , 58 Mass. App. Ct. 239 (2003)	5, 8
<u>Commonwealth v. Reese</u> , 438 Mass. 519 (2003)	12
<u>Commonwealth v. Zimmerman</u> , 58 Mass. App. Ct. 216 (2003)	2, 15
<u>Eccleston v. Bankosky</u> , 438 Mass. 428 (2003).....	3, 10, 15, 20
<u>Loneragan-Gillen v. Gillen</u> , 57 Mass. App. Ct. 746 (2003)	9, 15
<u>Mattoon v. City of Pittsfield</u> , 56 Mass. App. Ct. 124 (2002).....	9, 11, 12
<u>Sheila S. v. Commonwealth</u> , 57 Mass. App. Ct. 423 (2003).....	8
<u>Silverman v. Spiro</u> , 438 Mass. 725 (2003)	23
<u>Szymkowski v. Szymkowski</u> , 57 Mass. App. Ct. 284 (2003)	1, 9, 12
<u>Zucco v. Kane</u> , 439 Mass. 503 (2003).....	11

ABUSE – DEFINITION OF ABUSE

Szymkowski v. Szymkowski, 57 Mass. App. Ct. 284 (2003) - Kantrowitz, Kass, Mills.

See Domestic Violence – Abuse Prevention Order.

ADOPTION- DISPENSING WITH PARENTAL CONSENT, AMERICANS WITH DISABILITY ACT

Adoption of Terrence, 57 Mass. App. Ct. 832 (2003) - Greenberg, Doerfer, Kafker. See Evidence - Burden of Proof; Evidence – Findings from Prior Termination Proceeding; Parental Unfitness - Sufficiency of Evidence; Visitation - Posttermination/Postadoption Visitation.

The Appeals Court affirmed the decree terminating Mother’s parental rights and remanded the case for further hearing on posttermination visitation. Id. at 833. The Court held that sufficient evidence existed of Mother's current unfitness. Id. Mother argued that the Department of Social Services did not accommodate her disability which resulted in her failure to regain custody of her child. The Appeals Court relied on Adoption of Gregory, 434 Mass. 117, 120 (2001) and held that since termination proceedings do not constitute services under the Americans with Disabilities Acts (ADA), the ADA is not a defense to a termination proceeding. Id. at 837. However, the Department of Social Services must accommodate a parent's special needs. If a parent does not think DSS is reasonably accommodating the disability, then the parent should claim a violation of her rights when a parenting plan is adopted or when the parent receives services. Id. In the instant case, Mother failed to make a timely claim to raise the issue of noncompliance with the ADA. Id. at 836-837.

Adoption of Eduardo, 57 Mass. App. Ct. 278 (2003) - Gelinas, Doerfer, Green. See Conflict of Interest - Department of Social Services; Parental Unfitness - Sufficiency of Evidence (Nexus).

The mother appealed from a decision to dispense with her consent to adoption, arguing that DSS did not accommodate her mental health needs pursuant to the Americans with Disabilities Act. The Appeals Court disagreed. The Court noted that DSS repeatedly offered services to help correct some of the problems, such as her dirty apartment, housing, parenting, domestic issues, and for her to identify and treat her mental health issues, but Mother refused the services. Id. at 280-281. She discontinued treatment with her therapist and did not take her prescribed medication. Id. at 281. Further, the Court commented that the parent has the burden of claiming a violation of the ADA in a timely manner, i.e., “either when the parenting plan is adopted, when he receives those services, or shortly thereafter.” Id. at 281-282 (quoting Adoption of Gregory, 434 Mass. 117, 124 (2001)).

ADOPTION – DISPENSING WITH PARENTAL CONSENT, BEST INTERESTS OF CHILD (BOND WITH FOSTER PARENTS)

Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) - Duffy, Kass, Trainor. See Evidence – Unsupported 51A; Findings of Fact – Deference to Trial Judge, Delay in Proceedings; Visitation - Termination of Parent Visits.

See Parental Unfitness- Sufficiency of Evidence.

Adoption of Daniel, 58 Mass. App. Ct. 195 (2003) - Cowin, Kass, Green. See Reasonable Efforts; Trial Practice - Late Disclosure of Witness.

See Parental Unfitness - Sufficiency of Evidence.

ADOPTION - DISPENSING WITH PARENTAL CONSENT, STANDING OF SIBLING

Adoption of Pierce, 58 Mass. App. Ct. 342 (2003) - Cypher, Mason, McHugh. See Counsel – Conflict of Interest; Visitation – Sibling Visitation.

In Adoption of Pierce, the Appeals Court held that a child does not have standing to appeal a judgment dispensing with parental consent to the adoption of her sibling. Id. at 346. Louise, the older of two half siblings, appealed from a judgment dispensing with her parents' consent to the adoption of her half-brother, Pierce, because it failed to include an order for postadoption sibling visitation. The Appeals Court held that Louise "has no legally cognizable interest" in the termination proceeding involving her brother. Id. at 346. "She does not, therefore, have standing to appeal the decree." Id. The Court concluded that Louise's interest in sibling visitation may be addressed under G.L. c.119, §26 even after her brother is adopted. Id. 345.

APPELLATE PRACTICE - MOOTNESS

Care and Protection of Perry, 438 Mass. 1014 (2003) (rescript).

See 72-Hour Hearing.

APPELLATE PRACTICE - PRESERVATION OF APPELLATE ISSUE, BEST INTERESTS OF CHILD

Adoption of Terrence, 57 Mass. App. Ct. 832 (2003) - Greenberg, Doerfer, Kafker. See Adoption - Dispensing With Parental Consent, Americans With Disability Act; Due Process - Burden of Proof; Evidence – Findings from Prior Termination Proceeding; Parental Unfitness - Sufficiency of Evidence.

See Visitation - Posttermination Visitation/Postadoption.

APPELLATE PRACTICE - PRESERVATION OF APPELLATE ISSUE, INDIGENT COURT COSTS ACT

Commonwealth v. Zimmerman, 58 Mass. App. Ct. 216 (2003) – Brown, Greenberg, Mason.

See Indigent Court Costs Act.

APPELLATE PRACTICE – RECONSTRUCTING THE RECORD

Commonwealth v. Kelly, 57 Mass. App. Ct. 201 (2003) – Beck, Smith, Kantrowitz.

Where transcripts are unavailable, a hearing should be held to attempt to reconstruct the record. Id. at 214 (citations omitted). All counsel are obligated to use their best efforts to ensure the reconstruction of the record if possible. Id.

APPELLATE PRACTICE – SEVERANCE OF DECREES

Care and Protection of Georgette, 439 Mass. 28 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Counsel - Conflict of Interest; Counsel – Ineffective Assistance; Counsel – Right to Counsel; Counsel – Role of Child's Counsel.

The SJC held that where an appeal involves some siblings but not others, child's counsel should file a motion in the trial court "to separate the [non-involved] decrees from the appeal." Id. at 31. This would permit the non-involved children to be adopted, instead of having to wait until the final resolution of the appeal. Id.

In this case, the trial judge entered decrees terminating parental rights with respect to two children (Beth and Judith) and adjudicating three others in need of care and protection (Georgette, Lucy and Rena). Georgette and Lucy filed a motion for new trial, claiming they received ineffective assistance because their trial counsel represented multiple siblings with different express preferences and because he advocated a position contrary to their wishes. Their motion was denied and they appealed from the judgments and from the denial of their new

trial motion. The Appeals Court affirmed, and the SJC accepted further appellate review only on the motion for new trial. Because Georgette and Lucy's claim of ineffective assistance was based on conflicts in the attorney's representation of Rena, and expressly excluded Beth and Judith, the decrees freeing Beth and Judith for adoption were not implicated in the appeal before the SJC. "The decrees pertaining to [them] should not have been prolonged by mixing their cases with this appeal." Id. Beth and Judith's counsel should have filed a motion to separate their decrees from the appeal. Id. "Counsel practicing in this area must be alert to this type of situation, which can be common when litigation concerns multiple siblings, as it did here, so that vulnerable children do not incur harm as the result of unnecessarily waiting for a final determination of their status." Id.

APPELLATE PRACTICE – STANDING

Adoption of Pierce, 58 Mass. App. Ct. 342 (2003) - Cypher, Mason, McHugh. See Counsel – Conflict of Interest; Visitation – Sibling Visitation.

See Adoption - Dispensing With Parental Consent, Standing of Sibling.

CHILD SUPPORT

Eccleston v. Bankosky, 438 Mass. 428 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Emancipation of Children.

Cailyn Bankosky was born to parents who then divorced. She subsequently was placed with guardians, and the parents were ordered to pay support to the guardian. When Cailyn turned 18, her guardian sought continuation of the support order to enable Cailyn to go to college. The SJC agreed with the father that the judge erred in ordering him to pay post-minority support pursuant to G.L. c. 208 § 28 (the divorce statute) because the statute only allows a parent to file on behalf of a child who is residing with the parent. Id. at 433. However, the SJC held that the probate court has equitable authority under G.L. c.215, §6 to enter a support order under these circumstances. Id. at 434-438.

CHILD'S PREFERENCE – WEIGHT GIVEN IN DETERMINING CUSTODY

Care and Protection of Georgette, 439 Mass. 28 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Severance of Decrees; Counsel - Ineffective Assistance; Counsel – Role of Child's Counsel.

See Counsel – Right to Counsel.

CONFLICT OF INTEREST - DEPARTMENT OF SOCIAL SERVICES

Adoption of Eduardo, 57 Mass. App. Ct. 278 (2003) - Gelinas, Doerfer, Green. See Adoption -Dispensing With Parental Consent - Americans With Disability Act; Parental Unfitness - Sufficiency of Evidence (Nexus).

The Appeal's Court rejected the mother's argument that DSS had an impermissible conflict of interest because it was a defendant in a lawsuit filed by the mother arising from events that took place when the mother was in foster care as a child. Id. The mother had a long history with the Department of Social Services. She was in foster care until 3 ½ when she was adopted. She later had difficulties which were attributed to the abuse she suffered in foster care. She and her adoptive mother brought an action against DSS. Id. at 279. Because of this history, DSS assigned case management duties to another agency. After the goal changed to adoption, case management duties reverted to DSS. Id. at 279- 280.

The Appeals Court rejected the mother's conflict of interest argument, holding that there is "no per se rule that the mere pendency of litigation by a parent against DSS requires disqualification of DSS as an advocate against that parent in a custody case." Id. at 280. The Court noted that there was no evidence that DSS was motivated by any

factors other than the child's well-being, that only 2 of the 12 witnesses at trial were DSS employees, and that the mother had ample opportunity to vigorously cross-examine the DSS witnesses for bias. Id. at 280-281.

COUNSEL - CONFLICT OF INTEREST

Care and Protection of Georgette, 439 Mass. 28 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Severance of Decrees; Counsel - Ineffective Assistance; Counsel – Right to Counsel; Counsel – Role of Child's Counsel.

The SJC ruled that the child, Lucy, failed to demonstrate her trial counsel had an actual conflict of interest in his joint representation of her and her sister Rena. Id. at 35. Although the two siblings had expressed different positions regarding custody, Rena's custody was not in dispute at trial and therefore no conflict existed. Id. at 35.

The case involved five siblings only one of whom (Lucy) was still involved at the time of the SJC's decision. Beth, Judith and Rena did not wish to return home, while Lucy and Georgette had expressed a preference to return to their father's care. The trial judge entered decrees and judgments that terminated the father's parental rights as to Beth and Judith and placed Georgette, Lucy and Rena in the permanent custody of the department. Lucy and Georgette filed a motion for new trial claiming, among other things, that their attorney had a conflict of interest, which was denied. Lucy, Georgette and their father appealed from the decree, judgments and from the denial of the new trial motion. The Appeals Court affirmed. Care and Protection of Georgette, 54 Mass. App. Ct. 778 (2002). The SJC accepted further appellate review solely on the denial of Lucy and Georgette's motion for new trial. Georgette turned 18 while the appeal was pending.

The SJC held that Lucy did not demonstrate an actual conflict of interest. Id. at 35. The Court noted that her new trial motion only concerned the joint representation of Lucy, Georgette and Rena, and expressly excluded any conflict of interest claim involving Beth and Judith, something that the motion judge apparently overlooked. Id. at 35. Although Rena wished to remain in foster care, her father did not challenge this at trial. The SJC concluded that "because Rena's custody was not a disputed issue, Lucy has not demonstrated that her trial counsel's joint representation of her and Rena presented an actual conflict." Id. "Stated differently, there is no showing that Lucy's trial representation of either Lucy or Rena would be 'directly adverse' to the other, or that the representation of either child would be 'materially limited' by trial counsel's duties to the other child." Id. at 35-36 (citing Mass. R. Prof. C. 1.7(a)).

Commonwealth v. Boateng, 438 Mass. 498 (2003) – Marshall, Greaney, Cowin, Sosman, Cordy.

The SJC rejected the defendant's claim that he was denied effective assistance of counsel because his trial attorney represented one of the Commonwealth's witnesses – the medical examiner – in unrelated civil litigation. Id. at 509. The defendant was informed of the conflict and agreed to have his attorney continue to represent him. Id. at 509-510. The judge's colloquy of the defendant regarding the defendant's waiver of the conflict was adequate, though not in the form and with the level of detail that the SJC prefers. Id. Further, the conflict was only potential, not actual. The medical examiner's testimony regarding the cause of death was peripheral to the defense of insanity asserted by the defendant and indeed some of the testimony supported the insanity defense. Id. at 512.

Adoption of Pierce, 58 Mass. App. Ct. 342 (2003) - Cypher, Mason, McHugh. See Adoption - Dispensing with Parental Consent, Standing of Sibling; Visitation – Sibling Visitation.

Louise, the half-sister of Pierce, sought an order providing for sibling visitation between the two. DSS stopped the visits in January 1999 because they were harmful to Pierce. However, counsel for the two did not move to withdraw until after trial on the petition to dispense with consent to Pierce's adoption in October 1999. Louise's new attorney moved to reopen the evidence to submit additional evidence concerning posttermination and postadoption sibling visitation, and filed subsequent motions for sibling visits, all of which were denied. Id. at 344-345. The Appeals Court held that child's counsel should have moved to withdraw in January 1999 when it

became apparent that the siblings' interests in visitation diverged. Id. at 346 n.7.

COUNSEL - INEFFECTIVE ASSISTANCE

Commonwealth v. Montanez, 439 Mass. 441 (2003) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Evidence – Hearsay, Fresh Complaint; Trial – Errors in Judge versus Jury Trial.

The defendant's attorney provided ineffective assistance in failing to object to numerous instances of inadmissible hearsay. Id. at 453. "We can discern no tactical reason for this failure." Id. However, the attorney's conduct did not deprive the defendant of an "otherwise available, substantial ground of defense." Id.

Care and Protection of Georgette, 439 Mass. 28 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Severance of Decrees; Counsel - Conflict of Interest; Counsel – right to Counsel; Counsel - Role of Child's Counsel.

The SJC affirmed the denial of the child's motion for a new trial based on ineffective assistance of counsel because the child failed to show she was prejudiced by counsel's performance. The motion for a new trial alleged that counsel was ineffective because he: 1) had a conflict of interest by representing multiple siblings with conflicting interests; and 2) he did not represent the child's expressed preference to return to her father's custody. Id. at 32–33. With respect to the second claim, the SJC held that even if the attorney had advocated contrary to the child's wishes, she "failed to demonstrate any prejudice based on the overwhelming proof of the father's unfitness." Id. at 34. The SJC relied on the standard established in Commonwealth v. Saferian, 366 Mass. 89, 96 (1974), first applied to child welfare cases in Care and Protection of Stephen, 401 Mass. 144, 149 (1987). Care and Protection of Georgette, 439 Mass. at 33. Under the two-part Saferian test, the client must establish that counsel's behavior fell "measurably below that which might be expected from an ordinary fallible lawyer," and that counsel's conduct "likely deprived the [client] of an otherwise available, substantial ground of defence." Id. (quoting Commonwealth v. Saferian, *supra*).

The SJC also held that the child failed to demonstrate that her trial counsel had a conflict of interest in representing her and her sibling. Id. at 35-36. (See discussion above under Counsel – Conflict of Interest.)

Finally, the SJC noted in a footnote that the correct standard for appellate review of a judge's denial of a motion for new trial is whether the motion judge "committed a clear abuse of discretion." Id. at 33 n.6. The Appeals Court misstated the standard once in its opinion as requiring "clear and convincing evidence" that the judge abused his discretion, but the SJC held that the Appeals Court then went on to apply the correct standard. Id.

COUNSEL – RIGHT TO COUNSEL

Care and Protection of Georgette, 439 Mass. 28 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Severance of Decrees; Counsel - Conflict of Interest; Counsel – Ineffective Assistance; Counsel – Role of Child's Counsel.

In Care and Protection of Georgette, the SJC reaffirmed that in state intervention cases "children are entitled to counsel, that their autonomy and rights to be heard on issues affecting their interest should be respected, and that their positions, based on mature expressions, are entitled to weight in custody proceedings (although not determinative)." Id. at 36.

Commonwealth v. Pamplona, 58 Mass. App. Ct. 239 (2003) – Grasso, Dreben, Mills.

The Appeals Court held that the defendant did not demonstrate good cause to discharge his court-appointed attorney after the trial began. Id. at 240-241. The judge could have properly concluded that the defendant's claims were no more than "a manipulative eleventh hour attempt to obstruct the orderly disposition of the case." Id. (citation omitted). Having been given the option of proceeding with current counsel or representing himself

pro se, the defendant knowingly and intelligently waived his right to counsel. Id. at 241-242. The judge's colloquy was sufficient. The judge advised the defendant of the difficulties involved in representing himself and repeatedly offered the defendant the opportunity to have counsel remain in a standby capacity. Id.

COUNSEL – ROLE OF CHILD'S COUNSEL

Care and Protection of Georgette, 439 Mass. 28 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Severance of Decrees; Counsel - Conflict of Interest; Counsel – Ineffective Assistance; Counsel – Right to Counsel.

At issue in this case were trial counsel's ethical duties when representing children in state intervention cases. Given the complexity of the issues and the wide variety of opinions about the proper role of child's counsel, the SJC referred the matter to its Standing Advisory Committee on the Rules of Professional Conduct to study and formulate suitable standards. Id. at 45. In the meantime, the SJC held that children's counsel should follow the standards established by the Committee for Public Counsel Services, as those standards are consistent with the Rules of Professional Conduct. Id. at 45-46.

The SJC began by acknowledging the enormous challenge in representing children in these cases, particularly where there are multiple siblings with differing ages, competencies, interests, and express wishes, and where one or more children may wish to return home despite compelling evidence that this would be harmful to them. Id. at 36-37. The Court then went on to discuss the applicable Rules of Professional Conduct as well as the CPCS performance standards governing representation of children in care and protection and termination of parental rights cases. Id. at 37-41. The Court found that the attorney in Georgette acted properly within the rules of professional conduct and CPCS standards. Id. at 39 n. 5.

Under Rule 1.14, a lawyer is obligated to, “as far as reasonably possible, maintain a normal client-lawyer relationship with the client’ even when the ‘client’s ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or for some other reason.” Id. at 37-38 (quoting Mass. R. Prof. C. 1.14(a), 426 Mass. 1361 (1998)). Departure from the normal client-lawyer relationship is only permitted when the client cannot communicate or make adequately reasoned decisions and if the lawyer believes the client is at risk of harm. Id.

Under the CPCS Performance Standards, if counsel reasonably determines that the child is competent to make an adequately considered decision, or that the child is unable to do so but the child's expressed preferences would not place him at risk of substantial harm, counsel shall represent the child's expressed preferences. Id. at 40-41 (citing CPCS Performance Standards 1.6(b) & (d)). If the child is incapable of verbalizing a preference, counsel shall make a good faith effort to determine the child's preferences and represent that position or, alternatively, counsel may request the appointment of a guardian ad litem "next friend" to direct counsel in this determination. Id. (citing CPCS Performance Standard 1.6(c)). If the child cannot make an adequately reasoned decision and the child's expressed preferences would pose risk of substantial harm to him, counsel shall:

- (i) represent the child's expressed preferences regarding the matter;
- (ii) represent the child's expressed preferences and request the appointment of a guardian ad litem/ investigator to make an independent recommendation to the court with respect to the best interests of the child;
- (iii) inform the court of the child's expressed preferences and request the appointment of a guardian ad litem/next friend to direct counsel in the representation; or
- (iv) inform the court of the child's expressed preferences and determine what the child's preferences would be if he was able to make an adequately considered decision (i.e., substituted judgment) regarding the matter and represent the child in accordance with that determination.

Id. (citing CPCS Performance Standard 1.6(d)).

The SJC then went on to discuss various standards and models throughout the country and the specific views of the various amici in this case. Id. at 41-45. The SJC concluded that this area of law needs some clarification, but until guidelines are implemented the CPCS Standards should be followed. Id. at 45. The Court noted that the CPCS Standards are consistent with Rule 1.14 in that they permit a deviation from the typical attorney-client relationship only when a child cannot verbalize a preference, or when the child cannot make an “adequately considered decision” and the attorney determines that the child’s expressed preferences places the child “at risk of substantial harm.” Id. at 45-46 (quoting Standard 1.6(c) and (d) of CPCS Standards). In those cases, counsel should substitute judgment for the child, “a subjective determination that most closely resembles a normal attorney-client relationship.” Id. at 46. The CPCS standards protect children by requiring attorneys in those situations to inform the court of the child’s preference. Id. at 46. The Standards provide additional protection to these children by permitting counsel to ask for a guardian ad litem. Id.

COUNSEL – RULES OF PROFESSIONAL CONDUCT, PERJURIOUS TESTIMONY BY CLIENT

Commonwealth v. Mitchell, 438 Mass. 535 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy.

In Commonwealth v. Mitchell, the SJC discussed the obligations of a criminal defense attorney under Mass. R. Prof. Conduct 3.3(e) when an attorney believes his client intends to commit perjury. Rule 3.3(e) provides that in a criminal case, if the defense attorney “knows” that his client intends to testify falsely, the attorney: (1) cannot assist the defendant in constructing false testimony; (2) must strongly discourage the client from testifying falsely; and (3) must seek to withdraw if he discovers this intention before trial. If the lawyer is not permitted to withdraw, or if trial has already begun, the rule provides procedures for the defendant to testify in narrative form without the assistance of counsel. Rule 3.3(e) applies only in criminal cases. In civil cases, Rule 3.3(a)(4) prohibits an attorney from offering evidence he knows to be false. If the client has already testified falsely, counsel must “take reasonable remedial measures,” which include informing the court of the client’s perjury. Rule 3.3, Comment [6].

In Mitchell, after the Commonwealth and defense presented its case, the defendant informed his counsel he wanted to testify. Id. at 542. Defense counsel then approached the bench and informed the trial judge that he would be invoking Rule 3.3(e) because his client wanted to testify, and he had concerns about participating in a fraud, but that he could not disclose any more information. The trial judge required trial counsel to stand up while the defendant testified in narrative form and to object to the cross-examination questions by the prosecutor. Id. at 539-543. On appeal, the defendant argued that he was denied effective assistance of counsel when his trial counsel invoked Rule 3.3 (e), and that the trial judge unconstitutionally applied the rule.

The SJC first addressed the standard for determining when an attorney “knows” that his client intends to testify falsely. The Court explained that in order to invoke the rule, defense counsel must have “a firm basis in fact.” Id. at 546. The standard requires that “a lawyer act in good faith based on objective circumstances firmly rooted in fact.” Id. at 546. The rule requires more than mere suspicion or conjecture. Id. at 546, 552. Inconsistencies in the evidence or in the defendant’s version of events are not enough, even where the inconsistencies raise concerns in counsel’s mind about his client’s honesty. Id. at 553. Strong physical evidence implicating the defendant also is not sufficient. Id. The attorney can rely on the facts presented to him and has no independent duty to investigate. Id. at 546.

The SJC held that the facts of the case met the “firm basis in fact” standard. Id. at 547. Although the defendant first told his lawyer he did not commit the murders, he later said that he did commit the murders. His admission was corroborated by substantial evidence, including inculpatory statements the defendant made to others. Id. The SJC also noted that defense counsel had thirty-five years of experience as a lawyer. Id.

The SJC further held that the defendant should have been present at the sidebar conference when the Rule 3.3 discussion occurred; however, the error was harmless given the particular facts of the case. Id. at 547-548.

Finally, the SJC rejected the defendant's argument that application of Rule 3.3(e) created an actual conflict of interest, necessitating appointment of new counsel. Id. at 549, 552.

COUNSEL – WAIVER OF COUNSEL

Commonwealth v. Pamplona, 58 Mass. App. Ct. 239 (2003) – Grasso, Dreben, Mills

See Counsel – Right to Counsel.

CROSS EXAMINATION - IMPROPER QUESTIONING

Commonwealth v. Murphy, 57 Mass. App. Ct. 586 (2003), Cypher, McHugh, Kafker. See Witnesses – Competency of Child Witness.

The defendant was convicted of rape of a child under the age of 16. On appeal, the defendant argued that the prosecutor's cross-examination of him was improper. A witness must not be subjected to questions whose only purpose is to humiliate, harass, annoy, inflame or degrade. Those types of questions exceed proper cross-examination. Id. at 588-590; see Commonwealth v. Johnson, 431 Mass 535, 540 (2000). Where as here, the prosecutor could not expect any helpful testimony would come from the inflammatory question, it exceeded the bounds of proper cross-examination. Id. at 590.

CROSS EXAMINATION - LIMITATION

Commonwealth v. Jordan, 439 Mass. 47 (2003) – Greaney, Spina, Cowin, Cordy.

The trial judge did not err in limiting defendant's cross-examination of a prosecution witness. Id. at 55. A criminal defendant's right to cross-examination is not absolute. A judge has broad discretion to limit the scope and extent of cross-examination, as long as he does not completely bar examination about a relevant subject. Id. Here, the subject matter was only marginally relevant and cumulative of other evidence. Id.

DEPARTMENT OF SOCIAL SERVICES – CLAIMS AGAINST

Sheila S. v. Commonwealth, 57 Mass. App. Ct. 423 (2003) - Cypher, Smith, Grasso.

In 1982, DSS placed the plaintiff, then 14 years old, in the custody of an uncle who sexually abused her. In 1995, the plaintiff filed a complaint against DSS and two social workers claiming that they failed to protect her from the abuse. The complaint alleged negligence, negligent infliction of emotional distress, and breach of fiduciary duty against the Commonwealth, and violations of 42 U.S. C. § 1983 against the social workers. Id. at 424. The Appeals Court held that the statute of limitations barred the plaintiff's state law claims against DSS, and that the social workers were protected by qualified immunity.

PRACTICE TIP: If you believe your child client may have a claim against DSS for harm suffered while in care, request the appointment of a guardian ad litem under G.L. c.201, §34 to investigate, and if appropriate, prosecute the claim.

Adoption of Eduardo, 57 Mass. App. Ct. 278 (2003) - Gelinas, Doerfer, Green. See Adoption -Dispensing With Parental Consent - Americans With Disability Act; Parental Unfitness - Sufficiency of Evidence.

See Conflict Of Interest - Department Of Social Services.

DEPARTMENT OF SOCIAL SERVICES – FAILURE TO DISCLOSE CHILD'S CHANGE OF PLACEMENT

Adoption of Terrence, 57 Mass. App. Ct. 832 (2003) - Greenberg, Doerfer, Kafker. See Adoption - Dispensing With Parental Consent, Americans With Disability Act; Due Process - Burden of Proof; Evidence – Findings from Prior Termination; Parental Unfitness - Sufficiency of Evidence.

See Visitation - Posttermination Visitation/ Postadoption Visitation.

DISCOVERY - FAILURE TO COMPLY, EXPERT WITNESS

Mattoon v. City of Pittsfield, 56 Mass. App. Ct. 124 (2002) - Porada, Smith, and Gillerman. See Evidence – Hearsay, Admissions of a Party Opponent; Evidence – Hearsay, Official/Public Records.

The Court concluded that the trial judge acted within his discretion in excluding the plaintiffs' expert witness, since the plaintiffs delayed responding to the judge's order to identify the expert, the plaintiffs canceled three depositions, the plaintiffs had been warned that witnesses would be precluded if the deposition did not occur, and the plaintiffs failed to file an affidavit from their expert explaining sufficient cause for the delay. Id. at 128-134. In addition, statements contained in a public document were properly excluded because they were in the nature of expert opinion and the authors were not identified as expert witnesses prior to trial. Id. at 136, 138. Finally, another of plaintiff's witnesses was properly excluded "because his testimony would have been in the nature of expert opinion and he was not designated as an expert." Id. at 138.

DOMESTIC VIOLENCE – ABUSE PREVENTION ORDER

Loneragan-Gillen v. Gillen, 57 Mass. App. Ct. 746 (2003) – Jacobs, Laurence, Cowin.

See Judicial Discretion.

Szymkowski v. Szymkowski, 57 Mass. App. Ct. 284 (2003) - Kantrowitz, Kass, Mills. See Evidence – Hearsay, Official/Public Records.

The Appeals Court held that the defendant-father's conduct against his seven-year old daughter did not constitute "abuse" under G.L. c. 209A, the abuse prevention statute. Id. at 284-285. The father (1) told the girl about a frightening dream he had involving her death, (2) threw a plastic milk container at her, (3) kicked the back of her legs in irritation while both were in bed, and (4) hit her under her chin, again in irritation. Id. at 285-286. The Court concluded that the father's actions are unacceptable parental behavior, but they do not involve physical harm or anticipation of imminent serious physical harm as required by the statute. Id. at 288. "The facts in this case lie more on the intemperate parenting side of the line than the parental violence side of the line." Id.

DUE PROCESS – BURDEN OF PROOF

Adoption of Salvatore, 57 Mass. App. Ct. 929 (2003) (rescript). See Parental Unfitness - Sufficiency of the Evidence; Witnesses - Parents.

The judge did not impermissibly shift the burden of proof to the parents when he permitted DSS to call the parents as witnesses in its case in chief. Id. at 930-931.

Adoption of Terrence, 57 Mass. App. Ct. 832 (2003) - Greenberg, Doerfer, Kafker. See Adoption- Dispensing With Parental Consent, Americans With Disability Act; Evidence – Findings from Prior Termination Proceeding; Parental Unfitness - Sufficiency of Evidence; Visitation - Posttermination Visitation/Postadoption.

The Appeals Court affirmed the decree terminating the mother's parental rights and remanded the case for further hearing on posttermination visitation. Id. at 833. The Court held that sufficient evidence existed of the mother's current unfitness. Id. The mother argued that the trial judge improperly shifted the burden of proof when she stated in her findings that the mother "has demonstrated little change in her situation" and "has not demonstrated

that she is capable of caring for the child.” The Appeals Court concluded that the trial judge's words that the mother "has demonstrated" or "has not demonstrated" do not rise to the level of shifting the burden to the mother, but that the trial judge was merely summarizing the evidence. Id. at 836.

EMANCIPATION OF CHILDREN

Eccleston v. Bankosky, 438 Mass. 428 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Child Support.

Cailyn Bankosky was born to parents who then divorced. The father was ordered to pay child support. When Cailyn was eleven she was placed in the custody of the Department of Social Services, then returned to her mother's custody, and ultimately placed with the plaintiff, Kathleen Eccleston, and her husband who were later appointed Cailyn's guardians. Id. at 429 - 430. The trial judge transferred the child support order to the guardians. When Cailyn turned 18, her guardian sought continuation of the support order to enable Cailyn to go to college. The SJC held that although no statute provided for post-minority support in these circumstances, the probate court had equitable authority to enter such an order.

In the course of its decision, the SJC discussed the issue of emancipation of minors. “[T]he Commonwealth has recognized that merely attaining the age of 18 years does not by itself endow young people with the ability to be self-sufficient in the adult world.” Id. at 436. The Court noted that there are a number of statutes designed to support children after they turn 18, among them laws governing post-minority support and entitlement to workers' compensation benefits. In addition, “[t]he Legislature has also enacted laws to ensure that children who have ‘aged out’ of foster care on reaching the age of eighteen years receive postminority support to enable them to pursue opportunities for education, rehabilitation, and training.” Id. (citing G.L. c.119, §23). The Court commented that age alone does not automatically emancipate a child. Id. at 434-436. Children may be emancipated for some purposes but not for others. Id.

EVIDENCE – EXPERT TESTIMONY, NEED FOR EXPERT WITNESS

Adoption of Daniel, 58 Mass. App. Ct. 195 (2003) - Cowin, Kass, Green. See Reasonable Efforts; Trial Practice - Late Disclosure of Witness.

See Parental Unfitness – Sufficiency of Evidence.

Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) - Duffy, Kass, Trainor. See Evidence – Unsupported 51A; Findings of Fact – Deference to Trial Judge, Delay in Proceedings; Visitation - Termination of Parent Visits.

See Parental Unfitness – Sufficiency of Evidence.

EVIDENCE – FINDINGS FROM PRIOR TERMINATION PROCEEDING

Adoption of Terrence, 57 Mass. App. Ct. 832 (2003) - Greenberg, Doerfer, Kafker. See Adoption- Dispensing With Parental Consent, Americans With Disability Act; Due Process - Burden of Proof; Parental Unfitness - Sufficiency of Evidence; Visitation - Posttermination Visitation/Postadoption.

The Appeals Court affirmed the decree terminating the mother's parental rights and remanded the case for further hearing on posttermination visitation. Id. at 833. The Court held that sufficient evidence existed of the mother's current unfitness. Id. The mother argued that several subsidiary findings by the trial judge were improper because they were based on findings made in a prior termination case heard by a different judge. The trial judge in the instant case took judicial notice of the prior adjudication but did not admit the document as an exhibit. The Appeals Court held that since the findings were supported by other evidence in the record, the mother's argument failed. Id. at 836.

EVIDENCE – HEARSAY, ADMISSIONS OF A PARTY OPPONENT.

Zucco v. Kane, 439 Mass. 503 (2003) – Marshall, Ireland, Spina, Cowin, Sosman, Cordy.

Factual statements contained in a settlement document prepared by a party's attorney are admissible against the party in another proceeding under the exception to the hearsay rule for admissions of a party opponent. Id. at 508.

Mattoon v. City of Pittsfield, 56 Mass. App. Ct. 124 (2002) - Porada, Smith, Gillerman. See Discovery - Failure to Comply, Expert Witness; Evidence – Hearsay, Official/Public Records.

The trial judge improperly excluded statements made by the defendant. Id. at 137. The judge excluded the statements because they contained hearsay and opinion. However, the rule prohibiting lay opinion does not apply to admissions of a party opponent. Id. In addition, admissions of a party do not have to be made on personal knowledge. Id. However, the plaintiff was not prejudiced because the statements were cumulative of other evidence. Id.

EVIDENCE – HEARSAY, DOCTRINE OF VERBAL COMPLETENESS

Commonwealth v. Eugene, 438 Mass. 343 (2003) – Marshall, Greaney, Spina, Cowin, Sosman.

The SJC held the trial judge did not err in prohibiting the defendant from introducing statements he made to the police as they were hearsay and were not admissible under the doctrine of verbal completeness. Id. at 350-352. The Commonwealth had introduced portions of the defendant's statement to the police regarding the incident. The defendant then sought to introduce other portions of his statement to the police which detailed events that occurred 10 days earlier. The Court held that to be admitted under the doctrine of verbal completeness the statements must (1) concern the same subject matter as the admitted statement, (2) be part of the same conversation as the admitted statement, and (3) be necessary for a fair understanding of the admitted statement. Id. at 350-351. The rule's purpose is to prevent one party from misleading the fact-finder by introducing only fragments of a statement. Id. at 351.

EVIDENCE – HEARSAY, FRESH COMPLAINT

Commonwealth v. Montanez, 439 Mass. 441 (2003) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Counsel – Ineffective Assistance; Trial – Errors in Judge versus Jury Trial.

The defendant appealed from convictions of sexual assault against the daughter of his live-in girlfriend. He argued that fresh complaint testimony was improperly admitted. Under the fresh complaint doctrine, a witness may testify that the complainant made a timely complaint and about the details of the conversation for the limited purpose of bolstering the complainant's credibility. Id. at 445. The complainant herself may testify that she made a complaint, but may only provide details of the complaint if the person she talked to, i.e., the fresh complaint witness, is also called to testify and is available for cross-examination. Id. at 445-446. In this case, the complainant did provide details of her conversations with others. Although not properly admissible under the fresh complaint doctrine, some of this testimony was admissible under the state of mind exception to the hearsay rule to explain her reasons for delaying in making a complaint. Id. at 447-448. Other testimony by the complainant about what she told other people was prohibited self-corroboration. Id. at 448. Additionally, the complainant's mother and a police detective were not called as fresh complaint witnesses and should not have been permitted to testify about their conversations with the complainant. Id. at 449. However, because the case was tried to a judge, not a jury, the SJC assumed that the judge would not be influenced by this improper testimony. Id. at 449. Had the case been tried to a jury the result might have been different. Id. at 450.

A concurring opinion by Justice Sosman (and joined by Justice Cordy) criticizes the fresh complaint doctrine as being outdated and unduly restrictive. Id. at 459. The concurrence explains that a victim's conversations with others about the assault is oftentimes relevant to explain the context, motivation and circumstances of the victim's

complaint in response to a defense theory of fabrication. Id.

Commonwealth v. Howell, 57 Mass. App. Ct. 716 (2003) - Laurence, Dreben, Trainor.

The defendant was indicted for indecent assault on a child under fourteen. He appeals a conviction based on two incidents in the indictment and the Appeals Court reversed based on improper use of fresh complaint testimony. Id. at 717.

Fresh complaint evidence is admissible for the limited purpose of corroborating the complainant's testimony. It is admissible only if it shows that the complainant seasonably complained of the attack. Id. at 719 (quoting Commonwealth v. Fleury, 417 Mass. 810, 813 (1994) and Commonwealth v. Licata, 412 Mass. 654, 660 (1992)). The fresh complaints were made approximately fifteen months after the last alleged incident. Id. at 720. Four fresh complaint witnesses testified, of those, two witnesses testified without fresh complaint instructions prior to the testimony. Id. at 722-723. Further, an instruction was given after one witness testified which was brief, contextually unclear, and failed to properly address the limited nature of the fresh complaint testimony. Id. at 723. The Appeals Court held that reversal was necessary because of "multiple infirmities" including 1) the complaints were at the outer limit of being timely, 2) there were multiple fresh complaint witnesses with little other evidence; 3) their were insufficient limiting instructions given to the jury, and 4) the judge impermissibly allowed the complainant to self-corroborate through the admission of his videotaped SAIN interview. Id. at 724.

EVIDENCE – HEARSAY, LEARNED TREATISE

Commonwealth v. Reese, 438 Mass. 519 (2003) – Marshall, Greaney, Spina, Cowin, Sosman, Cordy.

At a Chapter 123 sexually dangerous hearing, the judge improperly admitted certain articles on sexual recidivism. Id. at 526-527. "The articles were never established as reliable or authoritative, contain nothing but inadmissible hearsay, and do not satisfy any of the exceptions to the hearsay rule." Id. They could not be admitted under Prop. Mass. R. Evid. 803 (17) governing learned treatises because they had not been established to be reliable and because that exception to the hearsay rule only permits the document to be read into evidence on cross-examination of an expert. Id. It does not permit the document to be admitted as an exhibit. Id.

EVIDENCE – HEARSAY, OFFICIAL/PUBLIC RECORDS

Szymkowski v. Szymkowski, 57 Mass. App. Ct. 284 (2003) - Kantrowitz, Kass, Mills. See Domestic Violence – Abuse Prevention Order.

In a 209A proceeding, the defendant sought to introduce an unsupported 51B Report arising out of the same incidents as those alleged in the 209A application. The trial judge refused to consider the report because it was hearsay. The Appeals Court held that this was error. The judge could consider the facts contained in the report, although he was "entitled to reject the ultimate evaluation of the DSS social worker." Id. at 289. The Court stated that in 209A proceedings, "the rules of evidence need not be followed, provided that there is fairness in what evidence is admitted and relied upon...." Id. (quoting Frizado v. Frizado, 420 Mass. 592, 598 (1995)).

Mattoon v. City of Pittsfield, 56 Mass. App. Ct. 124 (2002) - Porada, Smith, Gillerman. See Discovery - Failure to Comply, Expert Witness; Evidence – Hearsay, Admissions of a Party Opponent.

The Appeals Court upheld the exclusion of a memorandum prepared by Department of Public Health employees because the public records exception to the hearsay rule does not permit the admission of evaluative reports, opinions or conclusions in government reports. Id. at 135. See also Commonwealth v. Slavski, 245 Mass. 405, 417 (1923) ("records of investigations required and inquiries conducted, either voluntarily or pursuant to requirement of law, by public officers concerning causes and effects involving the exercise of judgment and discretion, expressions of opinion, and making conclusions are not admissible in evidence as public records").

The memorandum also was objectionable because it contained hearsay and totem-pole hearsay. Mattoon, 56 Mass. App. Ct. at 135. Indeed, much of the written analysis, certain tables, and figures were derived from laboratory trials which the authors of the document did not perform and thus were facts not personally observed by the authors. Id. at 135-136. Indeed, it was not even clear whether the authors of the report were public officials because the memorandum included facts not personally observed by the authors and references to other sources. Id. at 135.

Finally, the memorandum contained opinions which were expert in nature and since the authors of the report were not identified as expert witnesses prior to trial, the document was properly excluded. Id.

Several other memoranda were also properly excluded because (1) nothing indicated they were created during the performance of an official duty; (2) many of the facts contained in the memoranda were not personally observed by the authors, instead the authors were investigating facts that had been recorded by someone else; and (3) the memoranda contained impermissible expressions of opinions, conclusions and results of investigations. Id. at 136.

Portions of another report were properly excluded because “the statement of facts detailed non-primary facts, i.e., facts that were not personally observable by the author without resort to discretion or judgment.” Id. at 138 (citing Adoption of George, 21 Mass. App. Ct. 265, 273-274 (1989)). In addition, the report contained an impermissible expression of opinion conclusion or result of an investigation, which was properly redacted. Id.

EVIDENCE – HEARSAY, PAST RECOLLECTION RECORDED

Commonwealth v. Evans, 439 Mass. 184 (2003) - Marshall, Greaney, Ireland, Spina, Sosman.

The defendants were convicted of murder in the first degree and illegal possession of handguns and ammunition. The Supreme Judicial Court affirmed the denial of motions for a new trial. Id. at 186.

A witness, Mr. Neal, testified that he knew the victim and recalled seeing the victim around the time of the murder. Id. at 189. Over objection, the prosecutor introduced a portion of Mr. Neal’s testimony before the grand jury as substantive evidence under the “past recollection recorded” exception to the hearsay rule. Id. This was an error. Id. at 189. A writing can be introduced under this exception to the hearsay rule if the following are satisfied: “1) the witnesses had no revivable recollection of the subject, 2) the witness had firsthand knowledge of the facts recorded, 3) the witness can testify the statement was truthful when made, and 4) the recording was made when the events were fresh in [his] memory.” Id. at 189, quoting Commonwealth v. Nolan, 427 Mass. 541, 543 (1998). The fourth element was not satisfied; however, the Supreme Judicial Court concluded the defendant suffered from no prejudice from this erroneous admission since the evidence was cumulative. Id. at 190-191.

EVIDENCE – HEARSAY, STATE OF MIND

Commonwealth v. Montanez, 439 Mass. 441 (2003) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Counsel – Ineffective Assistance; Trial – Errors in Judge versus Jury Trial.

See Evidence – Hearsay, Fresh Complaint.

EVIDENCE – UNSUPPORTED 51A

Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) - Duffy, Kass, Trainor. See Findings of Fact – Deference to Trial Judge, Delay in Proceedings; Parental Unfitness – Sufficiency of Evidence; Visitation - Termination of Parent Visits.

The child was injured by a lit cigarette in a restaurant. The hospital filed a 51A, but DSS unsupported the report because it found credible the mother’s explanation that it was an accident. Later at the termination trial, DSS

introduced evidence against the mother about the incident. The Appeals Court held that evidence may be admitted regarding an incident which DSS had unsupported. However, the evidence must show the proposition is true to a “high degree of probability.” Id. at 484-485 (quoting Adoption of Iris, 43 Mass. App. Ct. 95 (1997) and Tosti v. Ayik, 394 Mass. 482 (1985), cert. denied, 484 U.S. 964 (1987)). In this case, DSS’s evidence was not strong and the conclusion that the mother was either the perpetrator or negligent in her supervision was speculation. Id. at 485.

FINDINGS OF FACT – DEFERENCE TO TRIAL JUDGE, DELAY IN PROCEEDINGS

Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) - Duffy, Kass, Trainor. See Evidence - Unsupported 51A; Parental Unfitness - Sufficiency of Evidence; Visitation – Termination of Parent Visits.

The Appeals Court vacated a judgment adjudicating the child in need of care and protection and dispensing with the parents’ consent to adoption. Id. at 480. The case was filed in October 1994, and temporary custody was given to DSS. The petition was amended in March 1997, to include dispensing with parental consent to adoption. The trial took place on 13 days from May 1997 until August 1998. Id. at 481. The judge did not enter judgment until June 2000. He entered findings in September 2000, more than two years after the trial ended.

The Appeals Court held that the lengthy delay between trial and judgment called into question the accuracy of the judge’s findings. Id. at 486. While a judge is granted great discretion to assess the credibility of witnesses, it is crucial that the judge “actually remembers what the witnesses were like.” Id. at 486 (quoting Care and Protection of Three Minors, 392 Mass. 704, 705 n.3 (1984)). The Appeals Court stated it would not set a bright line rule as to the length of time after which one could question the judge’s findings. Id. at 486. However, three and a half years after trial began and two years after the trial concluded “strains the outer limits of any judge’s ability to remember witness demeanor and credibility.” Id. The Court noted that a number of the judge’s findings were incorrect, suggesting that the judge’s memory was compromised. Id. In light of the lengthy delay from the end of trial to the decision, the trial judge should have reopened the evidence to allow the parties to submit updated information. Id. at 486-487.

FINDINGS OF FACT - USE OF PROPOSED FINDINGS OF FACT

Care and Protection of Olga, 57 Mass. App. Ct. 821 (2003) - Lenk, Berry, McHugh. See Parental Unfitness – Sufficiency of Evidence.

The Appeals Court criticized the trial judge’s wholesale adoption of DSS’s proposed findings of fact, but nevertheless affirmed the judgment dispensing with consent to adoption of two children and adjudicating the third in need of care and protection. Id. at 822-824. All but the last page of 55 pages of findings of fact and conclusions were identical to DSS’s proposed findings and conclusions, including typographical errors. Id. at 822. The trial judge can use parties’ proposed findings to facilitate the process of writing a decision, but in doing so the judge must show the reader that he has given careful consideration to all the relevant evidence. Id. at 823.

Even where the judge simply “lifts” one of the party’s proposed findings, those findings will be affirmed if supported by the evidence. Id. at 823-824. While the “clearly erroneous” standard still applies, the findings themselves will be subjected to stricter scrutiny. Id. at 824 (citing Adoption of Hank, 52 Mass. App. Ct. 689, 693 (2001)). However, the Appeals Court also stated that there may be circumstances, not present in this case, where “sweeping adoption of the parties’ findings raises such substantial questions that the traditional view must give way.” Id.

The Appeals Court concluded that the evidence strongly, if not overwhelmingly, supported the judge’s decision. Id.

JUDICIAL DISCRETION

Lonergan-Gillen v. Gillen, 57 Mass. App. Ct. 746 (2003) – Jacobs, Laurence, Cowin.

A district court judge refused to issue a permanent protective order because his preference was that protective orders be renewed annually. Id. at 746-747. The Appeals Court held this was error. Id. at 746. Case law grants the judge discretion at a renewal hearing to let the protective order expire, to renew the order for a specific period of time, or to grant a permanent order. Id. at 748 (citing Crenshaw v. Macklin, 430 Mass. 633 (2000)). The Appeals Court explained that “the proper exercise of judicial discretion involves making a circumstantially fair and reasonable choice within a range of permitted options.” Id. at 748-749. A judge may not refuse to consider a permissible option on the basis of personal preference or philosophy. Id. at 749.

INDIGENT COURT COSTS ACT

Commonwealth v. Zimmerman, 58 Mass. App. Ct. 216 (2003) – Brown, Greenberg, Mason.

The Appeals Court considered defendant’s argument concerning the denial of his motion for funds for an expert witness even though he did not appeal the adverse ruling within 7 days as required by G.L. c.261, §27D, because the motion judge failed to advise him of his right to appeal. Id. at 221. As to the substance of his argument, the Appeals Court held that the record was insufficient to review his claim because the motion judge did not hold a sufficient hearing on the matter. Id. at 222.

The defendant had sought funds for an expert on eyewitness identification. The motion was denied because the judge concluded the evidence was of questionable admissibility and therefore an average defendant would not incur such an expense. Id. The defendant was convicted of armed robbery and assault and battery with a deadly weapon. On appeal, the defendant asserted among other things that his motion for funds was improperly denied. The Commonwealth argued that the defendant waived the argument because he did not file an interlocutory appeal. Under G.L. c.261, §27D, appeal must be made within 7 days. Additionally, the statute requires the judge to inform the applicant of his right to appeal. Id. 221 & n.3 (citing G.L. c.261, §27D). The Appeals Court held that ordinarily failure to appeal within the 7 days would result in a waiver. However, because the judge did not advise the defendant of his right to appeal, it would consider the issue on direct appeal. Id. at 221 (citing Commonwealth v. Lockley, 381 Mass. 156, 159-160). The requirement cannot be dispensed with on the assumption that defense counsel was nevertheless aware of his client’s right to interlocutory appeal. Id.

As to the merits of defendant’s claim, the Appeals Court concluded it could not decide the issue because the motion judge did not conduct a sufficient hearing before making her decision. Id. at 222. The judge did not consider the desirability or necessity of the expert evidence, which must be weighed in ruling on a motion for funds. Id.

JURISDICTION - PROBATE COURT EQUITY POWERS

Eccleston v. Bankosky, 438 Mass. 428 (2003) - Marshall, Greaney, Ireland, Spina, Sosman, Cordy; Cowin, dissenting. See Emancipation of Children; Child Support.

See Child Support.

MOTION FOR NEW TRIAL

Care and Protection of Georgette, 439 Mass. 28 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Appellate Practice – Severance of Decrees; Counsel - Conflict of Interest; Counsel – Right to Counsel; Counsel - Role of Child’s Counsel.

See Counsel – Ineffective Assistance.

PARENTAL UNFITNESS – EDUCATIONAL NEGLECT

Care and Protection of Emily, 58 Mass. App. Ct. 190 (2003) - Brown, Dreben, Doerfer.

The mother and her 17-year old daughter appealed from a judgment pursuant to a review and redetermination. Id. at 190. The trial judge found that mother unfit because she was unable to get her school phobic daughter to attend school. The Appeals Court reversed. Id. at 192-193. The Court explained that since Emily is no longer required to attend school pursuant to G.L. c. 76 § 1, then she cannot be found in need of care and protection solely on the ground that it might be better for her to continue her education. Id.

PARENTAL UNFITNESS – FITNESS TO PARENT ONE CHILD BUT NOT ANOTHER

Adoption of Salvatore, 57 Mass. App. Ct. 929 (2003) (rescript). See Witnesses - Parents.

See Parental Unfitness – Sufficiency of the Evidence.

Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) - Duffy, Kass, Trainor. See Evidence – Unsupported 51A; Findings of Fact – Deference Trial Judge, Delay in Proceedings; Visitation - Termination of Parent Visits.

See Parental Unfitness – Sufficiency of the Evidence.

PARENTAL UNFITNESS – SUFFICIENCY OF EVIDENCE

Adoption of Daniel, 58 Mass. App. Ct. 195 (2003) - Cowin, Kass, Green. See Reasonable Efforts; Trial Practice - Late Disclosure of Witness.

The Appeals Court affirmed the judgment of the trial court that the mother was currently unfit to parent her three children. The Court held that there was clear and convincing evidence of mother's unfitness. Id. at 201. The Court noted at the outset that the case was not simple because the mother was not incapable of caring adequately for her children. However, she repeatedly placed her own needs above theirs, and used poor judgment in caring for them. Id. at 196. The mother had initially placed her three children voluntarily with DSS. At the time she was homeless, unemployed, and was unable to pay a court fine, which placed her at risk of incarceration in New York. Although she made progress from that time, it was made independent of her children. Id. at 202. When two of the children (four year old twins) were temporarily returned to the mother's care, she asked the foster mother of her other child to take them for several days to give her a break, she left them with her sister who was an inappropriate caretaker, and on one occasion they were left alone in her apartment with the front door wide open. Id. at 201-202.

The mother also challenged the trial judge's findings regarding the children's attachment to their foster families. The Court noted that a child's bond with foster parents is not dispositive, but is one factor to be considered. Id. at 202-203. When a child's bond with foster parents becomes decisive in a case, the trial judge must prepare detailed findings directly addressing the harm the child would suffer by separation. Id. at 203. However, the Court held expert testimony is not necessary in all cases. Id. at 203. The Court noted that the children had been placed with their foster families at a very young age and had lived with the same family for over two years. Id. at 203. From this, the trial judge "could permissibly infer that some bonding had occurred" and "if there has been bonding, separation cannot be without some impact." Id. The Court finally commented that even if the judge's finding with respect to bonding were erroneous, there was still sufficient evidence of the mother's unfitness. Id. Compare Adoption of Rhona, 57 Mass. App. Ct. 479, 492-493 (2003), discussed below, where on similar facts the Court rejected the trial judge's findings regarding the anticipated harm should the child be separated from her foster parents.

Finally, the mother argued that several of the judge's subsidiary findings were not supported by the evidence and that this was fatal to the judgment. The Court held that the judge made specific and detailed findings, which showed that she paid close attention to the evidence. Daniel, 58 Mass. App. Ct. at 199-200. Many of the mother's

objections reflected disagreement with the judge's credibility determinations and the resultant weight she gave to the evidence. Id. at 200. Although three of the findings were not supported by the record, those do not alter "the overall thrust of the subsidiary findings." Id. at 201. Although the finding that the mother had willfully failed to provide support for the children was erroneous, this finding was harmless based on all the other evidence of her unfitness. Id. at 203.

Adoption of Terrence, 57 Mass. App. Ct. 832 (2003) - Greenberg, Doerfer, Kafker. See Adoption- Dispensing With Parental Consent, Americans With Disability Act; Due Process - Burden of Proof; Evidence – Findings from Prior Termination Proceeding; Visitation - Posttermination Visitation/Postadoption.

The Appeals Court affirmed the decree terminating the mother's parental rights and remanded the case for further hearing on posttermination visitation. Id. at 833. The Court held that sufficient evidence existed of the mother's current unfitness. Id. The Appeals Court noted that the trial judge may rely on a parent's prior pattern of neglect and misconduct, and he may take into account the child's condition while living with the mother as contrasted with the child's development after removal from the parent's care. Id. at 835. In this case, the findings demonstrated that the mother lacked the ability to shield the child from the father's harmful conduct, the mother had many abusive relationships with men, the mother failed to show improvement in parenting, the home continued to have unsanitary and unsafe conditions, the child's therapist felt that the child experienced severe developmental delays while with the mother, and the child had shown dramatic improvement since being placed in care. Id. at 835 - 836. The Court relied upon Adoption of Paula, 420 Mass. 716, 730 (1995). Id. at 836.

Care and Protection of Olga, 57 Mass. App. Ct. 821 (2003) - Lenk, Berry, McHugh. See Findings of Fact - Use of Proposed Findings of Fact.

The trial judge allowed the petition to dispense with consent to adoption for two children and found one child in need of care and protection after ten days of trial. On appeal, the parents argued that several of the judge's findings were clearly erroneous and that the record did not contain clear and convincing evidence of unfitness. The Appeals Court affirmed the decision. Id. at 822.

The Appeals Court held that while two of the findings of fact were clearly erroneous they were not central to the ultimate conclusion of unfitness. Id. at 824-825. The other challenged findings were supported by the evidence or were immaterial errors. Id. at 825. The Court also affirmed the trial judge's ultimate finding that the parents were unfit. Id. at 831. The parents had a long history of substance abuse and domestic violence, which dramatically affected their children. All three children were profoundly troubled, exhibited inappropriate behavior (e.g. running away, aggression, sexualized behaviors, etc.), and required a highly structured living environment and mental health treatment. Id. at 828-830. Although the parents had made some progress by the time of trial, the judge could still consider past behavior in predicting the parents' future conduct. Id. at 830. Further, the parents had little understanding of the damage they had caused their children, and of their children's specialized and intensive needs. Id. at 831. The Appeals Court explained that in determining the parents' current fitness, the court must consider their ability to assume the duties and responsibilities required of a parent, while considering their potential for future growth and improvement, as well as focusing on the needs, interests and requirements of the specific child. Id. at 830.

Adoption of Salvatore, 57 Mass. App. Ct. 929 (2003) (rescript). See Witnesses-Parents.

The Appeals Court affirmed the order finding that the child was in need of care and protection and the decree dispensing with the need for parental consent to adoption. Id. The mother argued that since she cared for another child, her daughter, she is also fit to parent Salvatore. However, the mother was only able to care for her daughter with considerable services and there was evidence that two children would be too much for her to handle. Id. at 929. The Court concluded that the Department of Social Services had met their burden by clear and convincing evidence. The trial judge found that the mental disorders of the parents interfered with their ability to parent; they failed to engage successfully in visits, failed to complete a service plan, and failed to participate in services offered by DSS. Id. at 929 -930. In addition, the mother lived with an uncle who had a history of child sexual

abuse and with a brother who had an open case with DSS. Id. at 930. She also continued to live with Salvatore's father, despite a history of domestic violence. Id.

Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) - Duffy, Kass, Trainor. See Evidence – Unsupported 51A; Findings of Fact – Deference to Trial Judge, Delay in Proceedings; Visitation - Termination of Parent Visits.

The Appeals Court vacated a judgment adjudicating the child in need of care and protection and dispensing with the parents' consent to adoption because the evidence was insufficient to conclude the parents were currently unfit. Id. at 482-488. The Appeals Court held that (1) the evidence was stale by the time judgment entered, (2) there was an insufficient nexus between the mother's alleged drug use and harm to the child, (3) the mother's ability to parent her other children, including one with special needs, undermined the judge's conclusion of unfitness; and (4) the trial judge erred in relying on the child's bond with her foster parents in rendering his judgment. Id.

The case was filed in October 1994 and temporary custody was given to DSS. The petition was amended in March 1997 to include dispensing with parental consent to adoption. The trial took place on 13 days from May 1997 until August 1998. Id. at 481. The judge did not enter judgment until June 2000. He entered findings in September 2000, more than two years after the trial ended. Id.

The judge's ultimate finding of unfitness was based primarily on the subsidiary finding that mother's drug use had harmed Rhona in the past and that any future relapse would place the child at further risk of harm. Id. at 483. The problem with that finding was that the most recent evidence of mother's drug use was in 1996, four years before judgment entered. From 1996 to 1998 when trial concluded, mother had maintained her sobriety and successfully completed treatment. Id. The judge improperly relied on stale evidence to predict future behavior while ignoring the more recent evidence of her sobriety. Id. at 483, 485. "The passage of four years is too long a period to rely on the predictive value of past behavior without verification – especially when evidence contradicting the prediction is readily available." Id. at 486. In light of the long delay in concluding the trial and entering judgment, the judge should have reopened the evidence to admit updated information about the parents' fitness. Id. at 486-487.

[PRACTICE TIP: Cases addressing the requirement of current parental unfitness generally discuss the need for evidence that the parents are unfit at the time of trial. In Rhona, the Appeals Court rejects findings because the evidence was stale at the time judgment entered. In future cases where there is a long delay between trial and judgment, counsel should consider seeking to reopen the evidence on the basis that the evidence introduced at trial is no longer current and/or should argue on appeal that the evidence was stale by the time the judgment entered.]

The Appeals Court further commented that "evidence of current unfitness based entirely on a prognosis of future harm must be more substantial in proceedings to dispense with parental consent to adoption than in a care and protection case." Id. at 488 (citing Adoption of Katharine, 42 Mass. App. Ct. 25, 33 (1997)).

In addition, the Appeals Court held that there was insufficient evidence of a nexus between mother's drug use and harm to the child. Id. Drug use without more is insufficient to support a determination of unfitness. Id. at 483–484 (citing Adoption of Katharine, 42 Mass. App. Ct. 25, 28 (1997)). The trial judge wrongly attributed two incidents in which the child was injured to Mother's drug use. Mother was not even present at the time of the first incident, and the second incident was determined by DSS to be an accident after a 51B investigation. Id. at 484-485.

The Court also criticized the trial judge for failing to consider evidence that mother was successfully parenting Rhona's younger sister, Nancy, since her birth. The Appeals Court explained that there are times when a parent may be fit to raise one child and not another. In those circumstances, the judge must "conclude that one child is in need of particular parental skills and stability that the mother was unable to provide." Id. at 487 (citation omitted). However, nothing in the record supported the conclusion that Mother could care for Nancy and not

Rhona. Id. at 487-488. Both girls were similarly bright, verbal and well-adjusted. Id. at 487. Further, Nancy had special needs as a baby, which the mother adequately addressed. Id.

Finally, the Appeals Court held that the trial judge erred in relying on the child's bond with her foster parents in rendering his judgment. Id. at 491-492. A child's bond with her foster parents is a factor to be considered, but it cannot be dispositive. Id. at 492. Otherwise, the placement of a child in foster care would determine the outcome in every case. Even where a child would be traumatized by separation, that cannot be the determining factor. Id. The child's bond with a foster parent cannot automatically trump the parents' rights. Id. at 492 (citing Adoption of Katherine, 42 Mass. App. Ct. at 30)). "To the extent that traumatic severance of bonds with a substitute caretaker [becomes] a decisive factor, a judge would be bound in findings to describe the nature of the bonds formed, why serious psychological harm would flow from the severance of those bonds, what means to alleviate that harm had been considered, and why those means were determined to be inadequate." Id. (quoting Adoption of Katherine, 42 Mass. App. Ct. at 30-31)). No such findings were made in this case. Id. Further, there was no expert testimony concerning the nature of the bonds, the harm that would result from separation, or what methods might alleviate the harm. Id. Compare Adoption of Daniel, 58 Mass. App. Ct. 195, 203 (2003), where the Appeals Court held that expert testimony was not necessary, and that the trial judge "could permissibly infer that some bonding had occurred" and that "separation cannot be without some impact."

PARENTAL UNFITNESS - SUFFICIENCY OF EVIDENCE, NEXUS BETWEEN PARENT'S CONDUCT OR CONDITION AND HARM TO CHILD

Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) - Duffy, Kass, Trainor. See Evidence – Unsupported 51A; Findings of Fact – Deference to Trial Judge, Delay in Proceedings; Visitation - Termination of Parent Visits.

See Parental Unfitness, Sufficiency of Evidence.

Adoption of Eduardo, 57 Mass. App. Ct. 278 (2003) - Gelinas, Doerfer, Green. See Adoption -Dispensing With Parental Consent-Americans with Disability Act; Conflict of Interest - Department of Social Services.

The Appeals Court held that the trial judge properly focused his findings on the adverse effects that the mother's behavior had on her ability to parent Eduardo and provide for his welfare and best interests, and not on her mental illness. Id. at 282. There was a sufficient nexus between the mother's mental illness and her refusal to accept services and the continued risk of abuse and neglect toward the child. The findings by the trial judge which were specific and detailed show that the judge paid close attention to the evidence, which proved the mother was unfit by clear and convincing evidence. Id. at 282-283.

PRIVILEGED COMMUNICATION - ACCESS TO PRIVILEGED RECORDS

Commonwealth v. Oliveira, 438 Mass. 325 (2002) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy.

See Privileged Communication – Psychotherapist-Patient.

PRIVILEGED COMMUNICATION – PSYCHOTHERAPIST-PATIENT

Commonwealth v. Oliveira, 438 Mass. 325 (2002) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy.

In Commonwealth v. Oliveira, the SJC held that the psychotherapist-patient privilege (G.L. c.233, §20B) and the social worker- client privilege (G.L. c.112, §135B) are not self-executing. Id. at 331. "The patient must therefore affirmatively exercise the ... privilege in order to prevent the psychotherapist [or social worker] from disclosing confidential communications at trial." Id. (quoting P.J. Liacos, Massachusetts Evidence §13.5.2, at 796 (7th ed. 1999)). See also Adoption of Carla, 416 Mass. 510, 515 (1993). Other statutory privileges such as the sexual assault counselor privilege (G.L. c.233, §20J) are automatic and do not require that the patient affirmatively assert the privilege. Oliveira, 438 Mass. at 331. n.7.

At issue in this criminal case was whether the trial judge had properly withheld the victim's treatment records under Bishop, when neither the victim, nor any member of her family asserted a privilege. The SJC held that the records to which no privilege was claimed, cannot be withheld based on the judge's in camera review. Id. at 337. In order to have the judge review the records in camera, a privilege must be asserted, and only when a privilege is asserted does Bishop apply. Id. The order denying the defendant access to the records was vacated and the matter remanded. Id. 330- 337.

PRIVILEGED COMMUNICATION – SOCIAL WORKER-CLIENT

Commonwealth v. Oliveira, 438 Mass. 325 (2002) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy.

See Privileged Communication – Psychotherapist-Patient.

REASONABLE EFFORTS

Adoption of Daniel, 58 Mass. App. Ct. 195 (2003) - Cowin, Kass, Green. See Parental Unfitness – Sufficiency of Evidence; Trial Practice - Late Disclosure of Witness.

The Appeals Court rejected the mother's argument that DSS failed to make reasonable efforts to reunify the mother with her children. Id. at 204. DSS maintained a goal of reunification for almost two years and even returned two of the children for several months. It was only after the return home failed that DSS changed the goal to adoption. Id. The mother's complaint that DSS did not provide housing or day care was irrelevant because the children were not removed for those reasons. Id. The Appeals Court did not rule on the issue raised by mother whether the reasonable efforts certification required by G.L. c. 119, §29C is a necessary component of a termination proceeding. Id. Instead, the Court concluded that the judge's findings "implicitly cover the subject." Id.

REASONABLE EFFORTS, DISABLED PARENTS

Adoption of Eduardo, 57 Mass. App. Ct. 278 (2003) - Gelinas, Doerfer, Green. See Conflict of Interest - Department of Social Services; Parental Unfitness - Sufficiency of Evidence (Nexus).

See Adoption- Dispensing With Parental Consent, Americans with Disability Act.

SIBLING RELATIONSHIP

Adoption of Pierce, 58 Mass. App. Ct. 342 (2003) - Cypher, Mason, McHugh. See Adoption - Dispensing with Parental Consent, Standing of Sibling; Counsel – Conflict of Interest.

See Visitation- Sibling Visitation.

TEENS AGING OUT OF FOSTER CARE

Eccleston v. Bankosky, 438 Mass. 428 (2003) - Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Child Support.

See Emancipation of Children.

TRIAL – ERRORS IN JUDGE VERSUS JURY TRIAL

Commonwealth v. Montanez, 439 Mass. 441 (2003) – Marshall, Greaney, Ireland, Spina, Cowin, Sosman, Cordy. See Counsel - Ineffective Assistance; Evidence – Hearsay, Fresh Complaint.

Improper fresh complaint evidence was admitted at defendant's trial without objection by defense counsel. Because the case was tried to a judge and not a jury the SJC "assume[d] that the judge is familiar with the law and did not permit himself to be influenced by such objectionable testimony." Id. at 449. The SJC affirmed the convictions, while acknowledging that the result might have been different had the case been tried to a jury. Id. at 449, 452.

TRIAL – REOPENING OF EVIDENCE

Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) - Duffy, Kass, Trainor. See Evidence - Unsupported 51A; Parental Unfitness - Sufficiency of the Evidence; Visitation – Termination of Parent Visits.

See Findings Of Fact – Deference To Trial Judge, Delay In Proceedings.

TRIAL PRACTICE - LATE DISCLOSURE OF WITNESS

Adoption of Daniel, 58 Mass. App. Ct. 195 (2003) - Cowin, Kass, Green. See Parental Unfitness - Sufficiency of Evidence; Reasonable Efforts.

The mother appealed from decrees dispensing with her consent to the adoption of her three children. The Appeals Court rejected the mother's argument that she was "ambushed" by testimony of an adoption worker who the Department had previously stated it would not call. Id. at 204- 205. The Department indicated the witness would be called almost one month before the date she testified. The Court stated that the mother had ample time to prepare for the witness's testimony, including resolving any discovery disputes. Id. at 204. Further, the mother did not move for a continuance. Id. Finally, the witness's testimony related to the foster parents and did not prejudice the mother on the issue of her fitness. Id. at 204-205.

TRIAL PRACTICE – OATH

Commonwealth v. Murphy, 57 Mass. App. Ct. 586 (2003) - Cypher, McHugh, Kafker. See Cross-Examination - Improper Questioning.

See Witnesses – Competence Of Child Witness.

VISITATION – CONDITIONAL ORDERS

Silverman v. Spiro, 438 Mass. 725 (2003) – Marshall, Greaney, Spina, Cowin, Sosman, Cordy.

See Visitation – Termination of Parent Visits.

VISITATION - POSTTERMINATION VISITATION/ POSTADOPTION VISITATION

Adoption of Terrence, 57 Mass. App. Ct. 832 (2003)) - Greenberg, Doerfer, Kafker. See Adoption - Dispensing With Parental Consent, Americans With Disability Act; Due Process - Burden of Proof; Evidence – Findings from Prior Termination; Parental Unfitness - Sufficiency of Evidence.

The Appeals Court affirmed the decree terminating the mother's parental rights, but remanded the case for further consideration on the issue of posttermination visitation because DSS failed to provide relevant information to the judge during a post-trial hearing on the mother's motion for visitation. Id. at 833.

During trial, the preadoptive parents testified on cross-examination that visits could occur maybe twice a year. Id. at 837. After trial, the mother filed a motion for monthly visits pending the outcome of the appeal, which was

denied. In December 2001, the preadoptive family decided not to adopt the child and he was returned to a previous foster home. In February 2002, Mother filed a motion for reconsideration of the visitation issue, because she had severed ties with the father and her housing situation had improved. The judge again denied the motion. DSS did not inform the judge or the parties that the child was no longer living in the preadoptive placement. Then during a July 2002 permanency planning hearing, the judge learned for the first time that the child's preadoptive placement had failed back in December 2001. Id. at 837 - 838.

DSS argued that the mother had not properly preserved the visitation issue at trial. The Appeals Court concluded that the mother's cross-examination of the preadoptive parents raised the issue for the judge only in a general sense and that her posttrial motions only concerned visitation pending resolution of the appeal. However, because of DSS's failure to inform the judge about the child's changed circumstances, the Appeals Court concluded that it was in the child's best interests to consider the mother's appellate argument "despite her failure to raise the question squarely at trial or in posttrial motions." Id. at 839.

Citing Adoption of Vito, 431 Mass. 550, 563-564 (2000), the Appeals Court explained that postadoption visitation is more likely to be in the child's best interests in situations where there is no preadoptive family and the child's only significant parent-child relationship is with the biological parent. Adoption of Terrence, 57 Mass. App. at 840. At the time the judge decided mother's motion for reconsideration, that was exactly the situation, although the judge believed she was deciding the visitation issue "in the context of a child who had formed strong, nurturing bonds with his preadoptive family." Id. (quoting Vito, 431 Mass. at 563). The Court stated that DSS should have informed counsel for the child as soon as the preadoptive family changed their mind, and DSS should have fully explained to the judge the changed circumstances at the hearing on visitation. The Appeals Court remanded the case for further consideration of posttermination visitation in light of the child's current circumstances. Id. at 841.

VISITATION- SIBLING VISITATION

Adoption of Pierce, 58 Mass. App. Ct. 342 (2003) - Cypher, Mason, McHugh. See Adoption - Dispensing with Parental Consent, Standing of Sibling; Counsel – Conflict of Interest.

On appeal, Louise argued that the trial judge erred (1) in failing to order postadoption sibling visitation as part of the judgment dispensing with parental consent to her brother's adoption, and (2) in denying her postjudgment motion for sibling visitation. The Appeals Court held that Louise did not have standing to appeal the termination decree involving her brother. Id. at 345-346. The Court also held that Louise did not have a constitutional right to sibling visitation, id. at 347-348, and that the trial judge did not abuse her discretion in denying Louise an evidentiary hearing on her postjudgment motion for sibling visitation. Id. at 348.

The case began when DSS filed a care and protection petition on behalf of Louise and her half-brother Pierce. In August 1998, the parties stipulated that both children were in need of care and protection. In January 1999, sibling visitation stopped because according to DSS it was harmful to Pierce. In October 1999, trial concluded on a petition to dispense with consent to the adoption of Pierce. Counsel for the children then moved for leave to withdraw from representing Louise since the children's interests conflicted on the issue of sibling visitation and new counsel was appointed. Id. at 343-344. In November 1999, new counsel sought to reopen the evidence and submit information regarding posttermination and postadoption visitation between Louise and Pierce. The trial judge denied the motion, stating that the issue could be addressed at the upcoming permanency hearing. At the permanency hearing in January 2000, the trial judge ordered DSS to update the sibling visitation plan and allowed counsel to bring the matter back to court if not satisfied, but Louise's counsel took no action. In February 2000, the trial judge issued findings and judgment on the petition to dispense with consent to Pierce's adoption. The judge did not rule on sibling visitation but included in her findings that Pierce had been harmed by contact with his sister and that future contact should take place only if safe and appropriate. In September 2000 and again in September 2001, Louise moved unsuccessfully for sibling visitation. Id. at 344-345.

First, the Appeals Court held that G.L. c.119, §26 does not require the trial judge to make orders regarding

postadoption sibling visitation as part of a termination judgment. *Id.* at 345. Louise may seek an order of sibling visitation even after her brother's adoption. *Id.* at 345-346. Next, the Appeals Court rejected Louise's argument that she has a fundamental liberty interest in her relationship with her sibling. "While it is preferable that siblings be raised together ... the weight to be accorded sibling relations in the application of the best interests standard ... will vary with the circumstances." *Id.* at 347 (quoting Adoption of Willow, 433 Mass. 636, 651 (2001) and Adoption of Hugo, 428 Mass. 219, 231 (1998)). Further, the Appeals Court explained that G.L. c.119 §26 does not require an evidentiary hearing, rather the decision rests in the judge's discretion. The Court noted that Louise had ample opportunities to request an evidentiary hearing prior to her last motion but failed to do so. Under the circumstances, the judge's refusal to hold an evidentiary hearing in 2001 was not an abuse of discretion. *Id.* at 348. The Appeals Court concluded the trial judge fairly and impartially addressed the issue. *Id.* at 348-349.

VISITATION – TERMINATION OF PARENT VISITS

Silverman v. Spiro, 438 Mass. 725 (2003) – Marshall, Greaney, Spina, Cowin, Sosman, Cordy.

In this private custody dispute between two parents, the SJC struck down an order which provided that visitation between the mother and the children could only occur after the mother participated in an "appropriate" number of therapy sessions, to be determined by the therapist. *Id.* at 729 n.2, 736-737. The Court held that the order was improper because it terminated visits without required findings that visitation would harm the child. *Id.* at 737. In addition, the visitation issue should be decided by the judge and "the therapist should not have sole authority to determine the matter." *Id.* at 736-737 (citing Custody of a Minor (No. 2), 392 Mass. 719, 726 (1984).

Adoption of Rhona, 57 Mass. App. Ct. 479 (2003) - Duffy, Kass, and Trainor. See Evidence - Unsupported 51A; Findings of Fact – Deference to Trial Judge, Delay in Proceedings; Parental Unfitness - Sufficiency of Evidence.

The Appeals Court held that the parents were improperly deprived of visitation in violation of DSS regulations and without a court order, and that the cessation of visitation prejudiced their rights because it caused a deterioration in their relationship with their child. *Id.* at 490.

In November 1998, the Department of Social Services suspended visitation because of a single incident where the parents and an adoption worker had an altercation during a visit. The father filed a motion for visitation that was immediately followed by DSS's motion to terminate visits. A hearing was not held until the summer of 1999. The judge did not rule on the motions until June 2000, when he entered judgment in the termination proceeding. The Appeals Court held that the termination of visits violated the Department's regulations and the parents' rights. *Id.* at 488-490. Biological parents are entitled to visits as long as they are not harmful to the welfare of the child. *Id.* at 488. Visits cannot be terminated unless the judge makes specific findings supported by clear and convincing evidence that visits will harm the child or the public welfare. *Id.* at 488-489 (citing 110 CMR §7.128 (1998); Custody of Minor (No. 2), 392 Mass. 719, 726 (1984); Care and Protection of Ian, 46 Mass. App. Ct. 615, 620)).

In addition, the Court held that the parents were prejudiced by the unlawful termination of visits because "the parent-child bond was allowed to continue to deteriorate during a pivotal period in the judicial proceedings." *Id.* at 490. The Court noted that "it is unseemly for the Department to allow the process to drag on, prohibiting contact in the interim, and then argue in support of adoption that bonding [with the foster parents] has taken place." *Id.* at 490 (quoting Pet. of the Dept. of Soc. Servs. to Dispense with Consent to Adoption, 16 Mass. App. Ct. 607, 612 (1983)).

WITNESSES – COMPETENCE OF CHILD WITNESS

Commonwealth v. Murphy, 57 Mass. App. Ct. 586 (2003) - Cypher, McHugh, Kafker. See Cross-Examination - Improper Questioning.

The Appeals Court affirmed the defendant's conviction for rape of a child under 16, holding that the victim was

competent to testify. Id. at 591-592. The victim was seven years old at the time of the incidents and eight at the time of trial. Id. at 591. The victim's answers on voir dire showed he could recall, relate, and understand the difference between truth and falsehood and the importance of telling the truth. Id. at 591. Further, it was not essential to either swear in or affirm the child witness, where upon questioning by the judge, the child promised to tell the truth. Id. at 591-592.

WITNESSES - PARENTS

Adoption of Salvatore, 57 Mass. App. Ct. 929 (2003) (rescript). See Parental Unfitness - Sufficiency of the Evidence.

On appeal of judgments terminating the parents' rights, the father argued that the parents' rights were violated when DSS called him and the mother as witnesses because it shifted the burden of proof and denied him due process. Id. at 930. The Appeals Court disagreed, holding that absent assertion of a valid privilege, a parent can be required to testify. Id. at 930-931. The Court commented that when a parent's fitness is at issue, "there is no reason why the fact finder should be deprived of the testimony of the person whose behavior is most relevant to the proceeding." Id. at 930.

72 HOUR HEARING – DENIAL OF CONTINUANCE

Care and Protection of Perry, 438 Mass. 1014 (2003) (rescript).

The mother requested a 72-hour hearing but failed to appear because she admitted herself to a detoxification facility. Id. at 1014. The trial judge denied her request for a continuance. The mother filed a petition for relief under G.L. c. 211 § 3 and appealed the denial of relief pursuant to S.J.C. Rule 2:21 as amended, 434 Mass. 1301 (2001). Id. While the appeal was pending, the trial judge vacated the order and held a hearing over several days. Subsequently, a trial on the merits was held and the child was returned home. The SJC held that the mother's appeal was moot, but commented that the purpose of a 72 hour hearing is to allow a trial judge to assess whether a child is in immediate danger of serious abuse or neglect if returned to the parent or custodian. The hearing should be promptly held, and continuances sought by the parent to delay the hearing for personal benefit should be denied. Id.